No. 86-381

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SAN BERNARDINO,
Respondent,

RICHARD SMOLIN AND GERARD SMOLIN,
Real Parties in Interest.

BRIEF FOR AMICI CURIAE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE and NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

EPHRAIM MARGOLIN
240 Stockton Ave.
San Francisco, CA 94108
(415) 521-4347
Attorney for
Amici Curiae

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INTEREST OF AMICI CURIAE

California Attorneys for Criminal Justice (hereinafter CACJ) is a California criminal defense bar comprised of 1,800 lawyers active in criminal defense and dedicated to the preservation and improvement of a fair criminal justice system within our country.

The National Association of Criminal Defense Lawyers (hereinafter NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 4,000 lawyers who are citizens of every state. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The Supreme Court of California in People v. Superior Court (Smolin), 41 Cal.3d 758 (1986), approved of a habeas corpus court in an asylum state taking judicial notice of its own court records

to ascertain whether a person sought to be extradited by a sister state had been substantially charged with having committed a crime against her laws. In the case, the habeas court, by judicially noticing the existence of a valid custody decree granting respondent custody over his two children, determined that under the laws of the demanding state he could not properly be charged with kidnapping the two children, and granted respondent's request to halt his extradition.

CACJ and the NACDL, believing this to be a just result consistent with judicial precedent and the orderly prosecution of interstate crime, join respondents as amici to respectfully urge this Court to affirm the judgment of the Supreme Court of California.

SUMMARY OF ARGUMENT

This brief will assess the constitutionality of allowing an asylum court in extradition habeas corpus to go beyond the extradition documents by judicially noticing its own records in determining whether a person has been substantially charged with having committed a crime against the laws of the demanding state. The brief will show that this narrow inquiry has never been expressly forbidden by this Court and that the tribunals of several states have chosen to engage in similar analyses when confronted by like situations. It is the conclusion of amici that the inquiry is constitutional; the insignificant burdens on the swift rendition of fugitives resulting from engaging in it are outweighed by the benefits to be reaped from it.

ARGUMENT

PERMITTING AN ASYLUM COURT TO TAKE JUDICIAL NOTICE OF ITS OWN RECORDS TO DETERMINE WHETHER AN ACCUSED PERSON IS SUBSTANTIALLY CHARGED A CRIME AGAINST THE DEMANDING STATE'S LAWS IS CONSTITUTIONAL AND THE RESULTING BURDENS ON THE PROCESS OF INTERSTATE EXTRADITION ARE VERY LIGHT

The Extradition Clause in the United States Constitution, art. IV, (2, cl. 2, as implemented by Congress in Title 18 U.S.C. (3182, and the Uniform Criminal Extradition Act, 11 U.L.A. 59 (1974), where enacted, have secured the states the absolute right to bring to trial within their boundaries persons charged with having committed a crime against their laws. A corollary to this right is the prohibition on an asylum state to conduct a trial on the merits

of the accused person's case and attempt to ascertain his or her guilt or innocence of the underlying offense. Drew v. Thaw, 235 U.S. 432, 439-40 (1914); Uniform Criminal Extradition Act (20.

This Court in Michigan v. Doran, 439 U.S. 278 (1978), reiterated these salutary fundamental principles and delineated the limited scope of inquiry permissible by an asylum court when an alleged fugitive challenges her extradition in a habeas corpus proceeding:

> [A] court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the

person named in the request for extradition; and (d) whether the petitioner is a fugitive.

Id., 439 U.S. at 289.

The prohibition against passing on the merits of the alleged fugitive's case is thus qualified by these four issues open to inquiry. Should a habeas court ascertain that the accused has established the absence of at least one of these four requirements, such as identity or fugitiviness, the fact that the court may also collaterally determine that the person is not guilty of the underlying charge is not a bar to preventing extradition. See, e.g., Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903) (approving state court determination that extradition should be blocked as petitioner demonstrated that he was not in demanding state at time alleged crime

occurred).

Regarding inquiry into the substantiality of the demanding state's charge, there will also invariably be instances when a determination that the accused person was not charged with a crime involves passing on issues close to the merits of his case. Ordinarily this would not be a valid objection to a refusal to extradite. Roberts v. Reilly, 116 U.S. 80, 95 (1885). The question presently before this Court is whether simple factual evidence may be admitted through judicial notice of the asylum court's records in ascertaining the substantiality of the demanding state's charge. While no United States Supreme Court cases have directly addressed this issue, we urge this Court to answer the question in the affirmative.

A. NO VALID CONSTITUTIONAL AUTHORITY COMPELS AN ASYLUM COURT TO CONFINE ITSELF EXCLUSIVELY TO THE FACE OF THE EXTRADITION DOCUMENTS ASCERTAINING THE SUBSTANTIALITY OF THE DEMANDING STATE'S CHARGE

In extradition habeas corpus the issues of identity and fugitiveness are ones of fact and thus evidence beyond the four corners of the extradition documents is admissible to attempt to prevent erroneous extraditions. Biddinger v. Commissioner of Police, 245 U.S. 128, 135 (1917). Contrary to the position of the State of California as petitioner in the present case, no persuasive authority supports its assertion that an asylum court must absolutely confine itself to the face of the extradition papers in determining the substantiality of the charge of the demanding state.

The only United States Supreme Court case which passed on the question as to what evidence is admissible on this issue is both ambiguous and of questionable continuing validity. In Roberts v. Reilly, 116 U.S. 80 (1885), the Court stated that the question whether a person is substantially charged with a crime is a question of law which is "always open upon the face of the [extradition] papers to judicial inquiry." Roberts, 116 U.S. at 95. In discussing the merits of the case, the Court rejected petitioner's claim that the indictment did not substantially charge larceny because it did not state that the corporation from whose possession the property was taken was capable of ownership under the law of the demanding state. This issue, the Court held

> is not a matter of law arising upon the face of the

> indictment, but can arise only at the trial upon the evidence, if the question should then be made. The averment in the indictment is the allegation of a fact which does not seem to be impossible in law, and is, therefore, traversable.

Id. at 96.

As the Supreme Court of California concluded, this holding appears to mean that the courts of the asylum state are foreclsed from inquiring whether the law of the demanding state renders the actions alleged in the indictment a crime. People v. Superior Court (Smolin), 41 Cal.3d 758, 769 n.12 (1986). Even the petitioner recognizes that this is not the law today. Brief for Petitioner at 36-38. Without the ability to engage in an inquiry into the demanding state's laws, a habeas court

would have no frame of reference in ascertaining whether the accused stands charged with a crime. See People ex rel. Lewis v. Commissioner of Correction, 417 N.Y.S.2d 377, 380 (1979) ("It is this court's opinion that it has the power and obligation to make an inquiry [as to whether the acts charged constitute a crime] if properly raised."). The Roberts case, therefore, was decided under a principle of law no longer valid and its appellation regarding making a determination confined to the "face of the papers" must be considered only dictum.

No other case from this Court has addressed the precise issue before this court. Biddinger v. Commissioner of Police, 245 U.S. 432 (1914), for example, only dealt with evidence which may be considered on the issue of fugitiveness, while cases such as Drew v. Thaw, 235 U.S. 432 (1914), Strassheim

v. Dailey, 221 U.S. 280 (1911) and South Carolina v. Bailey, 289 U.S. 412 (1933), merely reaffirmed the truism that the asylum state is not the locus to conduct a trial on the merits of the accused person's case.

This Court's latest cases on extradition law have also not passed upon the propriety of the inquiry in question here. Michigan v. Doran, 439 U.S. 282 (1978), held only that an asylum court may not re-examine a sister state's judicial determination of probable cause in the habeas proceeding; while in Pacileo v. Walker, 449 U.S. 86 (1980), the Court prohibited inquiring into the constitutionality of the demanding state's penal system as a ground for barring extradition.

Other lower court cases cited by petitioner for the proposition that an asylum court is strictly confined to the extradition papers are inapposite. See,

e.g., United States v. Flood, 374 U.S. 554 (2nd Cir. 1967) (pursuasiveness of affidavit accompanying extradition warrant not proper subject for asylum court's determination).

B. TRIBUNALS IN SEVERAL STATES HAVE AUTHORIZED ACCEPTING SIMPLE FACTUAL EVIDENCE ON THE ISSUE OF WHETHER A PERSON IS SUBSTANTIALLY CHARGED WITH A CRIME.

While some states which have considered whether to go beyond the face of the extraditon papers have refused to do so, see, e.g., Hopper v. State ex rel. Schiff, 678 P.2d 699 (N.M. 1984), others have permitted such inquries, finding that doing so neither violated the Extradition Clause nor disrupted the summary nature of the rendition process.

The Supreme Court of Wisconsin, for example, in State v. Ritter, 246 N.W.2d

552 (Wis. 1976), analyzed the role of an asylum court when the alleged fugitive was charged with having committed a crime which, under the demanding state's laws, could only be charged if he was over 18 years old or if a demanding state juvenile court had first referred the case for adult prosecution. The petitioner sought to prove that the referral which had occurred was invalid and that he was under 18 years old and hence had not been properly charged with a crime. The Ritter court refused to assess the validity of the referral, believing it could not confidently resolve this difficult issue. The court did, however, expressly approve of going "beyond the face of the [extradition] documents and allow[ing] . . . evidence on a simple factual issue--age." Id. at 557. The court did not perceive that this narrow inquiry, which would aid its determination of the substantiality of

the charge, would in any manner disrupt the extradition process. The analysis permitted by Ritter was specifically approved by the Wisconsin Supreme Court under the strictures of this Court's opinion Michigan v. Doran in the case of State ex rel. Reddin v. Meekma, 306 N.W.2d 664 (Wis. 1981).

In State v. Gale, 312 S.W.2d 824 (Fla. App. 1975), a Florida appellate court analyzed a situation very similar to the one at bar and concluded that considering indisputable evidence beyond the face of the extradition papers was constitutional. The petitioner was sought by the demanding state for kidnapping children in violation of a custody order entered after his divorce. He attempted to show that he had not been substantially charged with a crime beause he had remarried his wife subsequent to the decree and, in so doing, had invalidated the prior custody

order. The court rejected his argument, finding that he had not established that under the demanding state's laws remarriage vitiates a custody decree. Nonetheless, the court approved of petitioner's introduction of evidence regarding his remarriage. It is clear under the rubric of Gale that had the law of the demanding state been clear on the subject, as the law of Louisiana is in the present case, neither the traditional bar on inquiring into the merits of a case nor the limitation, argued by petitioner, of not going beyond the extradition papers, would have prevented the court from halting an erroneous rendition.

Further examples of cases, decided in modern times, in which courts have authorized the introduction of extrinsic evidence on the substantial charge issue can be found in Ohio and Minnesota. These states allow a petitioner to

introduce proof to show that he or she is not substantially charged because the underlying criminal charge is merely a subterfuge to enforce a civil liability. See State ex rel. Gilpin v. Stokes, 483 N.E.2d 179 (Ohio App. 1984), elaborating on the Ohio Supreme Court's announcement of the principle in Carpenter v. Jamerson, 432 N.E.2d 177 (Ohio 1982), and State ex rel. Walker v. Ramsey County District Court, 368 N.W.2d 28 (Minn. App. 1985).

Tribunals in Wisconsin, Florida, Ohio and Minnesota have all concluded that accepting simple factual evidence on the issue of substantiality of a charge does not offend either the well-known prohibition against passing on the guilt or innocence of the accused person's case or interstate harmony. The Supreme Court of California thus proceeded upon ground already charted by several courts in sanctioning judicial notice of a

court's own records in extradition habeas corpus.

C. PERMITTING AN ASYLUM COURT ON HABEAS CORPUS TO JUDICIALLY NOTICE ITS OWN RECORDS DOES NOT DISTURB THE SWIFT RENDITION OF FUGITIVES AND PREVENTS THE HARDSHIP AND SIGNIFICANT RESTRAINT ON LIBERTY WHICH RESULTS FROM ERRONEOUS EXTRADITION

No decision by this Court has directly prohibited the inquiry in question and several states have permitted it. The only question that remains is thus whether the California Supreme Court's decision is constitutionally infirm under the caveats regarding the potential "balkanization" of the administration of interstate criminal justice articulated by this Court's opinion in Michigan v. Doran, 439 U.S. 530 (1978).

The Doran court, in forbidding re-examination of a demanding state's probable cause determination, was driven by concerns that the individual states not become sanctuaries for fugitives from justice and that they not engage in inquiries which may unduly delay the summary rendition process. The California Supreme Court's opinion in Smolin avoids both these pitfalls.

Doran's first concern can be succinctly capsulized as the fear that asylum states may make errors in assessing a person's case, thus becoming unwitting sanctuaries. Smolin's inquiry would not result in these errors. In order for a court to judicially notice its own records, the high standards of certainty and indisputability contained in the state's rules for judicial notice must first be met. See, e.g., Fed. R. Evid. 201, from which many states' rules on judicial notice are derived (fact to be

noticed must be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") While the congruence between Doran's statement that the four issues which may be inquired into are "historic facts readily verifiable," Doran, 439 U.S. at 289, and the language of many statutes on judicial notice may be coincidental, there can be no doubt that the result of both is the same: only facts which will not result in error can be considered.

Errors in the proceeding are also minimized by the extremely high burden of proof imposed on the suspect in extradition habeas corpus. The burden is usually set at "clear and convincing" or "beyond reasonable doubt." See Murphy, Revising Domestic Extradition Law, 131 U. Pa. L. Rev. 1063, 1115-17 & n.268 (1983), for a comprehensive list of standards adopted by states.

The concerns regarding delay of extradition proceedings are also met by the Smolin inquiry. The very purpose of judicial notice is to expedite factual determinations where the particular fact to be proved is outside the subject of reasonable controversy. Accepting evidence of this simple nature, and only in the form of readily accessible records of the habeas court, is far less susceptible to delay than other inquiries expressly permitted by Doran. For example, the inquiry into a person's fugitiveness carries the potential for dilatory tactics by the accused. See, e.g., In re Rowe, 423 N.E.2d 167 (Ohio 1981) (petitioner on extradition habeas corpus allowed to examine fourteen witnesses and cross-examine two others to show non-fugitiveness). The Doran Court was cognizant of the potential for delay inherent in these inquiries but concluded that "[t]here is nothing to

indicate that this type of routine and basic inquiry has led to the frustration of the extradition process." Doran, 439 U.S. at 297 n.7 (Blackmun, J., concurring).

The combination of the strictures of judicial notice and the high burden of proof will operate to screen out of the system only a minute number of cases where, as in the present case, it is clear beyond question that an accused person has not been substantially charged with a crime. The only inquiry permissible is into the judicial act in the court record noticed, not the hearsay statements within it or other legal papers such as motor vehicle ownership certificates. Furthermore, the inquiry does not result in any appreciable delay in the extradition process as judicial notice by its nature involves a minimum of time and court resources. Doran's "balkanization"

concerns are avoided by the California Supreme Court's decision and hence, it is consistent with that opinion.

A comparison of the scanty interference caused by the judicial notice inquiry with the benefits to be reaped from it also compels the conclusion that permitting it is consistent with public policy. As delineated before, the swift rendition of fugitives will not be hindered and the benefits of the inquiry are substantial.

As extraditions considerably tax a state's resources, interstate harmony will probably be promoted by allowing the inquiry, since it is probable that if the demanding state had known of the insubstantiality of its charge it would place its resources in prosecuting meritorious cases. In this regard, the asylum courts operate as a valuable adjunct to the screening function of the executive officials in charge of the

bulk of the extradition process.

Allowing extraditions in situations such as Smolin is to condone and perpetuate the perpetration of fraud on the judicial system. Persons should not be allowed to abuse the criminal system by improperly prosecuting private grievances as in the present case. To allow them to do so would be to supply civil litigants with an unfair weapon in their disputes to the detriment of the efficient allocation of scarce prosecutorial and judicial resources. While an unlimited fraud exception to extradition would be neither practical nor wise, allowing a court to prevent extradition where its own records clearly indicate the underlying fraud is a salutary outcome.

The greatest benefit of allowing the judicial notice inquiry is that it prevents individuals from suffering the enormous financial and emotional burden

which can result from an erroneous extradition. It is no answer to this consideration that persons in the Smolins' shoes may avoid this detriment by simply waiving extradition and presenting their case in the demanding state; persons should no more have to waive the procedural protections of extradition than any other right in our constitutional system.

CONCLUSION

This Court is here faced with a situation not previously addressed in its previous articulation of the extradition system. The inquiry in question, rather than allowing "[t]he case to . . . be tried on habeas corpus," Strassheim v. Daily, 221 U.S. 280, 286 (1911) (Holmes, J.), only permits an asylum court to screen cases out of the system where, through the simple expedient of judicial notice of its own

records, it can confidently ascertain that the accused person has not been substantially charged with a crime.

The only real argument against this narrow inquiry is that, in assessing issues closely related to the merits of the alleged fugutive's case, it appears to run afoul of the historical taboo against an asylum court determining guilt or innocence. The notion that a "rule simply persists from blind imitation of the past,"(O. Holmes, Collected Legal Papers 187 (1920)), has no place in this nation's criminal jurisprudence, and should not prevent this Court from permitting an inquiry salutorious to the control of interstate crime.

Respectfully Submitted,

Ephraim Margolin

February 17, 1987